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UNITED STATES SUPREME COURT

STATE OF NORTH CAROLINA

VS

ROSA L. OXENDINE HUNT

75-6847
From Anson

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT
TO REVIEW THE DECISION OF
THE NORTH CAROLINA SUPREME COURT

Now comes the petitioner, by and through her attorney, who petitions the United States Supreme Court for a Writ of Certiorari and says and alleges:

1. That your petitioner was tried at the June 10, 1974 Criminal Session of Anson County Superior Court upon an indictment charging Murder in the First Degree.

2. That upon arraignment the petitioner entered a plea of Not Guilty to the charges and trial was had in the Superior Court for Anson County, North Carolina on June 10, 1974, and that on June 10, 1974, the Jury returned its verdict of Guilty as charged and the Judgment of Death by Execution was entered.

3. That the petitioner filed Notice of Appeal, Affidavit of Indigency and requested the Court to set bond and appoint counsel to perfect the Appeal to the North Carolina Supreme Court.

4. That F. O'Neil Jones, an Attorney of Wadesboro, N. C., was appointed to handle and perfect the petitioner's case on appeal.

5. That pursuant to an Order of the Supreme Court of North Carolina, dated August 28, 1975, the Attorney, F. O'Neil Jones, was discharged as counsel by Judge Julius A. Rousseau, Jr. effective September 10, 1975 and Henry T. Drake, Attorney, Wadesboro, N. C., was appointed to perfect defendant's appeal.

6. That the Appeal was perfected and was heard before the North Carolina Supreme Court on February 10, 1976.

7. That by Opinion filed on March 2, 1976 the North Carolina Supreme Court found no error in the trial and a copy of this

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BEST COPY AVAILABLE

Opinion of the North Carolina Supreme Court is attached hereto and incorporated herein by reference as if recited verbatim.

8. That the petitioner raised several points on appeal to the North Carolina Supreme Court which involved violations of the constitutional rights of the defendant herein.

9. That the Supreme Court decided several points in its Opinion which were in direct violation of the Constitution of the United States and that a review of said decision would appear in the best interests of justice.

10. That several cases are now pending before the United States Supreme Court including cases from North Carolina which raise the question of whether or not the death penalty as imposed by the statute in the system of North Carolina results in cruel and unusual punishment in violation of the Constitution of the United States of America.

11. The rule in North Carolina is that the Court shall excuse the cause from the Jury panel any Juror who does not agree that the death penalty should be imposed under any circumstances. See State vs Crowder, 235 NC 42 203 S.E. 2d 33, (1954). The case just cited also permits the District Attorney to question individual jurors in regards to the belief in capital punishment. The defendant petitioner contends that this procedure is error in that it conflicts with the sixth amendment to the United States Constitution and the fourteenth amendment to the United States Constitution insofar as it permits the State to pick a Jury to decide both innocence or guilt and punishment, all at the same time; and allows the State to pick a biased Jury one which is primed to return a verdict of death. The Jury as selected under this procedure does not represent a cross-section of the community to determine the issues of guilt or innocence. Under this procedure, it is much like picking from a lynch mob, the persons to decide the guilt or innocence of the individual. The defendant petitioner contends that such is in violation of the Constitution of the United States of America as amended and in violation of Witherspoon vs Illinois 391 U.S. 510 88 S.Court. 1770 20 Lawyers Edition 2d 776, (1968).

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The defendant petition contends that in no other case before the Bar in the Trial Courts of North Carolina is the Jury questioned relating to the punishment of the individual and as such it is only in the unique case of Murder in the First Degree that the question of punishment is brought before the Jury; certainly in other cases if punishment were the issue, the defendant would be entitled to those who dilute punishment leniently as well as those who would punish severely. In a First Degree Murder Case the only question is whether or not they would punish severely. If they would, then they are a qualified Juror. If they would not, they are excluded automatically by operation of law.

12. The defendant petitioner also contends that the opinion of the Supreme Court of North Carolina violates the equal protection laws of the fourteenth amendment under the Constitution of the United States.

13. The defendant at the trial level raised the question of the sufficiency of the evidence to be subritted to the Jury by moving for Non-suit at the close of the State's testimony. That elission was overruled and again the objection was raised before the North Carolina Supreme Court. The defendant petitioner's contention was that the State failed to show that Joe Hunt who died in Mecklenburg County and the Joe Hunt who was dug up and an autopsy performed on that body in Robeson County, were one and the same persons. Defendant petitioner contends that there was no evidence that the person who died and lived in Lilesville, was the same person that was dug up. The Supreme Court of North Carolina, in overruling the objection, on page 5 of the Opinion hereto attached, stated that a photograph taken of Joe Hunt before he was buried and identified by the prosecuting witness, Jacobs, and another independent photograph taken of the body of Joe Hunt that was dug up, and identified by S.B.I. Agent was sufficient proof to submit to the Jury that the bodies were the same. Defendant petitioner contends that such evidence has not been allowed in any other case in North Carolina and that such a conclusion by the Jury without identification of the photographs probably would be su-

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conjecture and that as such, the case should have been dismissed on the merits.

14. Defendant contends that other cases in North Carolina have resulted in Non-suit, See State vs Hendricks 232 NC 447 61 S.E. 2d 349 (1950). Defendant further contends that the application of the law in this case denies to this defendant, an Indian, the equal protection of law in violation of the fourteenth amendment to the United States Constitution. It is interesting to note that in the opinions recited by the North Carolina Suprere Court no authority was given for the proposition that the photographs sufficiently established that the deceased actually died of poisoning. That the North Carolina Surreme Court in effect ruled is that no redical evidence is necessary to prove the cause of death in a poisoning case. This rule is contrary to all other rules of law presented in the State of North Carolina and violates due process of law under the provisions of the United States Constitution and is in violation of the constitutional rights guaranteed and protected by the United States Constitution for this petitioner herein, see G. S. 14-17 and the fourteenth arendment to the United States Constitution.

15. That the Court also ruled in its opinion that since the defense counsel did not object to certain evidence introduced into evidence at the trial level, that he could not raise the objection before the North Carolina Supreme Court; in effect ruling that although the evidence may have been incompetent, that the assignment of counsel autoratically waived the right to exclude such incorpetent testimony. Defendant contends that such a ruling is in violation of the due process of law of the United States Constitution and is a deprivation of the defendant petitioner's rights guaranteed under that Constitution.

WHEREFORE, the petitioner prays:

That the United States Supreme Court grant a Writ of Certiorari and review the decisions of the North Carolina Supre Court and that the Verdict and Judgment of the Superior Court for Anson County, North Carolina, be reversed and that a new trial be granted to this defendant petitioner.

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Respectfully submitted this 28th day of May, 1976.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

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Petitioner,

v

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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Dated: July 2, 1976

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 289 NC 403, 222 SE 2d 234(1976) and is attached to Petitioner's petition.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 USC §1257(3) to review the judgment referenced above which was filed March 2, 1976.

QUESTIONS PRESENTED

I. WHETHER THE QUESTIONING OF THE PROSPECTIVE JURORS AS TO THEIR ATTITUDES TOWARDS THE IMPOSITION OF THE DEATH PENALTY VIOLATED THE PETITIONER'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

II. WHETHER THE STATE'S EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT JOE HUNT'S DEATH WAS CUASED BY POISON, OR THAT THE AUTOPSY WAS PERFORMED ON THE BODY OF JOE HUNT.

III. DOES THE RULE THAT FAILURE TO OBJECT TO CERTAIN EVIDENCE PRECLUDES AN APPELLATE REVIEW OF ITS ADMISSIBILITY, VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONSTITUTION

Amendment VI

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

Amendment XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner was tried upon a bill of indictment charging her with the murder of Joseph Hunt. She was tried by a Judge and a jury in the Anson County Superior Court at Wadesboro, North Carolina during the June 10, 1974 session of the Court. The jury found the defendant guilty of murder in the first degree and the Superior Court entered its judgment condemning the defendant to death. The judgment of the lower court was affirmed by the Supreme Court of North Carolina on appeal. In that appeal: Assignment of Error No. 1 raised the issue set out in Question I of this Brief; Assignment of Error No. 10 raised the issue set out in Question II of this Brief, and; Assignment of Error No. 5 raised the issue set out in Question III of this Brief.

The respondent, State of North Carolina, agrees with those facts pertinent to this petitioner's rights as set forth in the opinion of the North Carolina Supreme Court which is attached to the petitioner's Petition for Writ of Certiorari and heretofore filed in this Court.

REASONS FOR NOT GRANTING THE WRIT

I. THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER THE QUESTIONING OF THE PHOSPECTIVE JURORS AS TO THEIR ATTITUDES TOWARDS THE IMPOSITION OF THE DEATH PENALTY VIOLATED THE PETITIONER'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES BECAUSE THE ISSUE HAS BEEN DECIDED BY PRIOR DECISIONS AND SUCH QUESTIONING WAS PROPER.

The issue of the propriety of questioning prospective jurors in regard to their attitude towards the death penalty has been addressed by prior decisions of this Court and therefore the petition should be denied in accordance with this Court's Rule 19.

Petitioner complains that it was a violation of her rights to allow the State to question prospective jurors concerning their attitude towards the death penalty. (The State did not challenge any juror for cause and used only its peremptory challenges.) In Witherspoon v Illinois, 391 U.S. 510, 83 S.Ct. 1770, 20 L.Ed. 2d 776(1968) this Court stated:

> ". . .nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear: (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Witherspoon v. Illinois, supra., footnote 21 at p. 522.

In North Carolina a jury does not have the discretionary function of recommending life imprisonment and therefore a verdict of guilty results in the automatic imposition of the death penalty. State v Waddell, 282 N.C. 431, 194 S.E. 2d 19(1973), which applied this Court's ruling in Furman v Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346(1972). A juror who was opposed to the death penalty would not vote for a finding of guilty knowing that a guilty verdict would result in the imposition of the death penalty.

The State contends that, based upon Witherspoon supra, it may challenge for cause those jurors who are opposed to the imposition of the death penalty under any circumstances and who also would not find the defendant guilty under any circumstances. Because a juror's attitude towards the death penalty may be the basis for sustaining a challenge for cause, the State should be able to ask questions concerning that attitude, and such questioning does not violate the defendant's right to a fair trial.

II. THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER THE SUFFICIENCY OF THE EVIDENCE TO ESTABLISH THAT JOE HUNT'S DEATH WAS CAUSED BY POISON OR THAT THE AUTOPSY WAS PERFORMED ON THE BODY OF JOE HUNT.

The question of the sufficiency of the evidence to sustain the denial of the petitioner's motions for nonsuit is not a federal question and therefore the petition for writ of certiorari should be denied in accordance with this Court's Rule 19.

In addition to the above reason the State contends that petition should be denied because the petitioner's motions were properly denied at the trial. In ruling on such a motion in North Carolina the evidence introduced by the State is to be considered in the light most favorable to the State and the State is to receive the benefit of inferences drawn therefrom. State v Baxter, 285 N.C. 735, 208 S.E. 2d 696(1974); State v Price, 280 N.C. 154, 184 S.E. 2d 366(1971). The State introduced evidence that the deceased's death was caused by his consumption of arsenic. A medical expert called by the State testified that in his opinion the death was caused by arsenic poisoning. (Rp 47) The State also introduced testimony and photographs establishing that the autopsy was performed on the body of Joe Hunt (Rpp 25,26,38,39). Therefore the petitioner's claim that the State did not introduce such evidence is not correct and the petitioner's motions were correctly denied at the trial.

III. THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER THE CONSTITUTIONALITY OF THE RULE THAT FAILURE TO OBJECT TO CERTAIN EVIDENCE PRECLUDES AN APPELLATE REVIEW OF ITS ADMISSIBILITY, BECAUSE THAT ISSUE IS NOT A FEDERAL QUESTION OF SUBSTANCE, AND IN FACT THE SUPREME COURT OF NORTH CAROLINA DID REVIEW THE ADMISSIBILITY OF THE EVIDENCE.

The evidence under consideration in this issue was merely illustrative and corroborative of previous direct testimony. As stated in the opinion below, at page 413, failure to object to that type of evidence consitutes a waiver of any objection to its admissibility. The admission of the evidence under consideration did not adversely affect any substantial federal or state right of the petitioner. A rule precluding review of evidence not affecting the petitioner's rights does not raise a federal question of substance. The State contends that in the absence of an effect on the petitioner's Constitutional rights the decision not to object should be considered a trial tactic and an appellate court may properly decide not to review the admissibility of such evidence. Whether or not to object to such testimony is recognized as a trial tactic in our adversary system of justice. The Supreme Court of North Carolina has stated in State v Blackwell, 276 N.C. 714, at page 720,

> "Both this Court and the United States Supreme Court recognize that under our system of jurisprudence the trial of criminal cases is adversary in nature. To hold that an accused, represented by counsel, may choose one theory of trial and, upon an adverse verdict, call upon the appellate court to grant relief on the ground that the presiding judge should have intervened and guided his defense to another theory, would destroy the adversary system of trial and further tilt the scales of justice in favor of the criminal by prolonging ad infinitum the pronouncement of judgment in criminal cases."

The State also contends that the evidence was properly admitted and further that the evidence would have been admitted even if there had been a timely objection to

its admission. Finally the State contends that the opinion below indicates that the Supreme Court of North Carolina, in recognition of the seriousness of the crime and the penalty, in fact did review the admissibility of the evidence and determined that such evidence was properly admitted. Although the North Carolina Supreme Court repeated the rule in regard to the waiver, it went on to state at page 413 "We find no merit in the defendant's assignment of error relating to the admission in evidence of the State's Exhibits 3 and 7 and the testimony relating thereto." Therefore the petitioner was in no way prejudiced by the lack of objection.

CONCLUSION

The petition does not set out a special or important reason for granting a writ of certiorari, nor does it establish that the decision of the North Carolina Supreme Court involved a federal question of substance which had not previously been decided or that the decision was not in accordance with prior decisions of this Court. The State contends that the petitioner has not alleged or established any of the reasons for allowance of the writ as required by subsection 1.(h) of Rule 23 of this Court and that therefore the petition should be denied in accordance with section 4 of Rule 23 of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA on petitioner by depositing the same in the United States Mail to:

HENRY T. DRAKE
129 North Greene Street
Wadesboro, North Carolina 28170

ATTORNEY FOR PETITIONER

This the 2nd day of July, 1976.

Charles J. Murray
Assistant Attorney General